The Malayan Law Journal

1991

REPORTS

OF MALAYSIAN, SINGAPORE AND BRUNEI CASES DETERMINED IN THE HIGH COURTS, THE SUPREME COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

SINGAPORE REPORTS

Rajendra Prasad v Public Prosecutor

COURT OF CRIMINAL APPEAL (SINGAPORE) — CRIMINAL APPEAL NO 7 OF 1990
YONG PUNG HOW CJ, LAI KEW CHAI AND CHAO HICK TING JJ

Criminal Law — Rape with hurt — Defence of consent — Victim taking Upjohn pills prior to assault — Penal Code (Cap 224, 1985 Ed), s 376(2)

Criminal Procedure — Further evidence — Admission of additional evidence on appeal — Discretion of appellate court to receive such evidence — Principles to be applied — Supreme Court of Judicature Act (Cap 322, 1985 Ed), s 55(1)

Criminal Procedure — Sentence — Rape with hurt — Robbery — Victim allowing herself to be chatted up — Whether victim's actions mitigated rape

The appellant was convicted of rape with hurt and robbery. He was sentenced to ten years and twelve strokes of the cane for the rape and to two years and six strokes for the robbery. He appealed against the conviction and sentence. In doing so he also applied by motion to admit additional medical evidence as part of the record of appeal to be considered. The additional evidence sought to show that the victim's taking of Upjohn pills prior to the alleged rape may have distorted her recollection of the incident.

Held, dismissing the appeal and the motion:

(1) The Court of Criminal Appeal has a wide discretion whether or not to allow additional evidence to be taken. Before this discretion can be exercised, it must first be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, the evidence must have an important influence on the result of the case, and the evidence be apparently credible. The evidence that the appellant sought to admit did not meet any of the three pre-conditions.

(2) The weight of the evidence against the appellant was also overwhelming. The rape was premeditated and carefully planned. The victim was injured and the rape was repeated. The fact that the victim may well have exposed herself to some danger by allowing herself to be chatted up, and to go off with two comparative strangers, was not a mitigating factor in the context of today's society. The sentences were not excessive.

Cases referred to

1 *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 (refd)
2 *Ladd* v *Marshall* [1954] 3 All ER 745 (fold)
3 *Skone* v *Skone* [1971] 2 All ER 582 (refd)
4 *Langdale* v *Danby* [1982] 3 All ER 129 (refd)
5 *Ali* v *Secretary of State for the Home Department* [1984] 1 All ER 1009 (refd)
6 *Schofield* v *Church Army* [1986] 3 All ER 715 (refd)
7 *Williams* v *Reason* [1988] 1 All ER 262 (refd)
8 *Lau Foo Sun* v *Government of Malaysia* [1970] 2 MLJ 70 (refd)

Legislation referred to

Penal Code (Cap 224, 1985 Ed) s 376(2)
Supreme Court of Judicature Act (Cap 322, 1985 Ed) s 55(1)

JB Jeyaretnam for the appellant.
Seng Kwang Boon (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Yong Pung How CJ (delivering the judgment of the court): The appellant Rajendra Prasad was convicted of two charges of committing rape with hurt, and was sentenced on the first charge under s 376(2) of the Penal Code (Cap 224, 1985 Ed) to imprisonment for ten years and to suffer twelve strokes of the cane. No sentence was passed on the second charge, as the offence was considered to be a part of the offence under the first charge and to come within the purview of s 71 of the Penal Code. In addition, the appellant was also convicted of committing robbery of $43 cash and a radio pager from the complainant and was sentenced under s 392 of the Penal Code to imprisonment for two years and a further six strokes of the cane. The sentences of imprisonment were ordered to run concurrently. The appellant appealed against the convictions and sentences. In doing so, he also filed a criminal motion for an order that additional evidence be admitted and form part of the record to be considered on the hearing of this appeal. The motion and the appeal came on for hearing on the same day. As we were of the view that it would be necessary to consider the relevance and importance of the additional evidence in the context of the whole of the evidence given at the trial and already available in the appeal record, we heard the arguments on the motion together with the arguments on the appeal. At the conclusion of the hearing, we dismissed the motion and the appeal against the convictions and sentences, and indicated that we would give our reasons later, which we now do.

The complainant was a 19-year-old factory girl at the time. On 23 August 1988 at about 3pm she was sitting on a stone bench in Outram Park, after buying Upjohn sleeping pills from a nearby clinic and consum-

ing some five of them. She had been in the habit of taking five of them each time twice a week for about a year. A man called Ricky Sim approached her and chatted her up. They were soon joined by his friend, an Indian boy 17 years old at the time, who lived in the same block of flats with him and is the appellant of this appeal. The conversation was carried on in very fluent Hokkien. The three of them apparently got on well, because they went off together, first to the Safra Clubhouse at Bukit Merah and then to a hawker centre at Alexandra Village. After all of them had drunk some beer there, they returned at Ricky Sim's suggestion to the Outram Park clinic where he also bought some Upjohn sleeping pills, and gave the complainant five of them to consume. While there, the appellant pulled the complainant aside and told her to go with him to see a friend of his who could manufacture these Upjohn pills and would give 200 pills to her for free. Upon hearing this, the complainant went alone with the appellant to Margaret Drive to see this friend. When they got to Margaret Drive, which was some time after 7pm, he led her behind the playing field of a school and through a fence and some undergrowth to a small disused stone building where he told her his pill-making friend was. While she was standing outside the building, he pushed her into it. She tried to run out of the building on seeing that there was no one inside it; he caught her, pushed her down to the floor in spite of her struggles, and while she was on the floor hit her several times on the back of her head with a stone. He forced her to undress, and raped her twice, with an interval of about 15 minutes in between.

The appellant then left her, after searching her belongings and taking away with him $43 and a radio pager which he found among them. After he left her, she groped in the dark for her things and found her lighter. With the light from it, she retrieved some of her clothing and dressed in her underwear and shirt, but could not find her Bermuda pants or her sandals. While she was still looking for the rest of her belongings, she claimed that she saw two ghosts. She was frightened, threw away the lighter, and ran out of the building. In the dark, she went through some undergrowth, scaled a fence, and came out of the school grounds on to the main road. A passer-by told her that it was 9pm and that she was at Margaret Drive. She managed to hail a taxi and persuaded the driver to take her home.

When she got home, her mother and sister saw that she was barefooted and did not have her pants on, her shirt was blood-stained and she was bleeding and had injuries to various parts of her body. She told them that she had been raped and robbed by an Indian man who was the appellant. That same evening they lodged a report with the police. As is normal in such cases, she was sent forthwith for a medical examination; the doctor's report showed that she had sustained fresh hymenal tears and there were 7 injuries to her body, including a laceration over her head. At about 11am that morning, 24 August 1988, she returned with the investigation officer, Inspector Dicky Wee, to the scene and together they managed to find the stone building, inside which various items of her belongings were found scattered on the floor, including her Bermuda pants and her sandals.

At about noon the next day 25 August 1988 the complainant established contact with the appellant through the pager. She asked for the return of her pager, and they met at Outram Park where he returned it to her. They then went to a coffee shop at Outram Park where Ricky Sim was waiting. On the pretext of going to the rest room, she tried twice to contact Inspector Dicky Wee to come and arrest the appellant and Ricky Sim, but he was not in his office. The next day 26 August 1988, Inspector Wee visited the complainant at her place of work. Soon after he got there, the pager sounded. It was the appellant who was calling her. She recounted to Inspector Wee what had happened the previous day and, on his instructions, arranged to meet the appellant again at Outram Park. At about 2pm the appellant showed up at Outram Park with Ricky Sim and they were promptly arrested.

Ricky Sim gave evidence at the trial. He confirmed the three meetings he had with the appellant and the complainant. He also disclosed that the appellant visited him at his flat on 24 August 1988 at about 7.30pm and told him that he had beaten up the complainant and had sexual intercourse with her.

After his arrest, the appellant made two statements at the CID which were recorded under s 122(6) of the Criminal Procedure Code (Cap 68, 1985 Ed). At the trial, however, he objected to the admission of these two statements on the ground that he was assaulted and was forced to give the statements. At the trial within a trial, the evidence showed that the appellant was examined at the Singapore General Hospital both before and after he made the two statements. The appellant had complained at the first examination that he had been beaten on his chest and on the soles of his feet. Dr Lim Soon Beng who examined him recorded his complaint of tenderness in a part of the chest but saw no injury on him. He testified in court that when he touched the appellant's chest during the examination, the appellant had over-reacted and he had recorded this in his report by using the word 'hyper-reaction'. The doctor who did the second examination of the appellant at the Singapore General Hospital later, after the two statements had been recorded, also did not detect any visible injury on the appellant's body. At the conclusion of the trial within a trial, the learned judicial commissioner found that both statements were voluntarily given by the appellant to the police, and he admitted them as evidence. We can see no reason to disagree with his findings.

We do not think it necessary to reproduce the two statements in full. In the first statement, the appellant recounted taking the complainant to the building at Margaret Drive. When she refused to have sexual intercourse with him, 'I slapped her three times on the face and hit her head against the wall', after which she agreed to it. After the sexual intercourse, he left her alone in the building. About one hour later, however, 'I returned to the building as I was afraid that she might have died because of the head injuries. When I returned I found that she was not there'. In the shorter second statement, he claimed that he only took her pager with her permission.

At the conclusion of the prosecution case, the learned judicial commissioner found that a case had been made out for the appellant to answer and he therefore called upon him to enter on his defence pursuant to s 189(1) of the Criminal Procedure Code. What the trial judge has to decide at this stage is a question of law, whether there is some evidence not inherently incredible which, if he were to accept it as accurate, would establish each of the essential ingredients of the offence of rape: *Haw Tua Tau* v *PP*.[1] In our view, there was ample evidence in this case for the learned judicial commissioner to decide to call upon the appellant to enter on his defence.

The appellant elected to give evidence on oath. He did not deny that he had sexual intercourse with the complainant on 23 August 1988 in the stone building off Margaret Drive. His defence was simply one of consent. He claimed that he first met her on 22 August 1988, the day before the sexual intercourse, when she approached him for money and he gave her $2 to enable her to go home. He met her again the next day 23 August 1988 when Ricky Sim was with her. Later that afternoon, after they returned from Alexandra Village to Outram Park and Ricky Sim left them to go to the clinic to buy some Upjohn pills, she told him that she loved him. When Ricky Sim came back from the clinic she consumed all the five pills which he gave her. After Ricky Sim finally left them again, they exchanged home telephone numbers. Later, when they were sitting together at the bus stop outside the school at Margaret Drive, he asked her whether she minded having sexual intercourse with him if she loved him, and she replied that she would agree if he promised to marry her. Having promised her that, he took her to the stone building behind the school field. He did not use force on her before having sexual intercourse. In fact, after sexual intercourse they sat together talking and smoking cigarettes. It was only when he asked her to leave the building together with him that for some unknown reason she refused and started scolding him. As a result, he became angry and left the building alone, leaving her behind. He also claimed that when she met him and Ricky Sim again at Outram Park on 25 August 1988, she spent many happy hours with them. This was the appellant's defence.

In considering the whole evidence before convicting the appellant, the learned judicial commissioner took into account the complainant's consumption of a number of sleeping pills before the incident, but was satisfied that she was conscious throughout the affair and knew what was happening. He discounted her reference to seeing ghosts, as he thought that this was only to be expected of a girl who had been assaulted, raped and robbed, and then left in a strange deserted building all by herself, and in the dark with only a flickering light from her cigarette lighter. He noted that she was not very precise about times and durations of events, and that there were minor discrepancies between her first police report and her evidence in court; and also in her evidence about her personal belongings left behind in the building. Nevertheless, having taken all this into account, he accepted her as a witness of truth. The events that followed the incident were such that it could not have been a case of a girl who had consented to sexual intercourse with her lover. He did not regard her subsequent telephone conversations and the meeting on 25 August 1988 to be significant as she had already reported to the police, and was trying to get her pager back, and to have the appellant arrested. On the other hand, the learned judicial commissioner found the appellant's story of a romantic love affair between two young lovers, which somehow turned sour suddenly for no apparent reason, to be most unconvincing, and he disbelieved him. He was therefore satisfied beyond reasonable doubt that the appellant was guilty of the offences charged and convicted him accordingly.

Together with the appeal, the appellant filed a criminal motion for an order that additional evidence in the form of a specialist report on the effects of Upjohn pills be admitted and form part of the record to be considered on the hearing of the appeal. The report was by Dr Edmund Lee, an Associate Professor in the Department of Pharmacology at the National University of Singapore. In support of the motion, the appellant also filed an affidavit by Dr Lee setting out his curriculum vitae, and Dr Lee was available in court if we wished to hear him. The Court of Criminal Appeal has a wide discretion whether or not to allow additional evidence to be taken at this stage of the proceedings. Section 55(1) of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) provides as follows:

> In dealing with any appeal the Court of Criminal Appeal may, if it thinks additional evidence is necessary, either take such evidence itself or direct it to be taken by the trial court.

This discretion must be exercised however in accordance with principles that have been laid down by the courts. In *Ladd* v *Marshall*,[2] Denning LJ said at p 748:

> In order to justify the reception of fresh evidence for a new trial, three conditions must be fulfilled: first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

Although this was only a dictum, it has been repeatedly applied as a principle in subsequent cases (see *Skone* v *Skone*;[3] *Langdale* v *Danby*;[4] *Ali* v *Secretary of State for the Home Department*;[5] *Schofield* v *Church Army*;[6] *Williams* v *Reason*.[7] In *Lau Foo Sun* v *Government of Malaysia*[8] the Malaysian Federal Court dismissed an application by the appellant at the hearing of the appeal to adduce additional evidence by an expatriate chief architect at the Ministry of Education who had left the country some years earlier, on the ground that the appellant could have discovered his whereabouts if he had used reasonable diligence.

What was this additional evidence which the appellant wished Dr Lee to adduce? In this report annexed to the notice of motion, and in the averments in his affidavit in support, Dr Lee stated that it was well known in medical circles that Upjohn pills or tablets were a street reference to a benzodiazepine sedative-hypnotic called triazolam which was manufactured by the Upjohn Corporation under the trade name of Somese. According to him, triazolam is a potent and relatively short-acting benzodiazepine, which is used medically to induce sleep in patients who have insomnia. The normal dose was one or two pills. In Singapore, drug users have little problem obtaining supplies from general practice clinics. Dr Lee said that he himself had not worked directly with triazolam, but the information on triazolam was readily available and could be independently evaluated. He attached to his reports several articles from medical journals. On the present case, he said that he had perused the evidence given by the complainant at the trial. He thought he had established by the evidence that on the day of the offence the complainant consumed ten pills with some beer at about 4pm. This might be expected to result in a considerable degree of drowsiness and disorientation, although the precise extent of this could not be predicted with any degree of certainty because habitual users develop a degree of tolerence. He thought some significance must be attached to her visual hallucinations of having seen ghosts, because a Canadian medical association journal had documented an instance of the production of 'confusion, belligerence, disorientation, and auditory and visual hallucinations' following consumption of a large amount of triazolam in a 57-year-old man. More importantly, triazolam also had a tendency to produce 'anterograde amnesia' or a state of forgetfulness about events occurring after the consumption of the drug. There was also the possibility of triazolam producing sexual fantasies in women. There was a case of a Canadian doctor who was acquitted of a sexual offence against his patient on the basis that the allegations stemmed from sexual fantasies induced by benzodiazepines which had been implicated, to assume that it might also produce these bizarre effects. In summary therefore, he was of the view that these unusual properties of triazolam should be seriously considered in the evaluation of the complainant's testimony.

In our view, if this was the additional evidence that the appellant wished the court to take, none of the three necessary conditions had been met. There was no evidence that the Upjohn pills were in fact triazolam, neither was there any evidence of the actual content or quantity of the pills from which an assessment of its clinical effect could be made. If indeed it was triazolam, the information on it was said by Dr Lee to be readily available, if the point was thought to be worth pursuing the evidence should have been made available at the trial. In fact, the possibility that the complainant might have been affected by the Upjohn pills was taken up by the appellant's counsel in a lengthy cross-examination of the complainant. In the present case, therefore, it is clear to us that Dr Lee's evidence, or the evidence of some other expert, could have been obtained with reasonable diligence at the trial.

Courts traditionally pay great attention to the evidence by the medical profession, but, with due respect to Dr Lee, the evidence which he was offering to give could hardly be considered to be relevant in the present case. The evidence did not establish that the complainant consumed ten pills with some beer at about 4pm, as he thought: it showed that she took five pills with some Pepsi-cola at about 3pm, and another five pills after returning to Outram Park from the beer drinking at Alexandra Village. We noted from her evidence that she had been taking five pills a time twice a week for about nearly a year already. There was no evidence as to what effect this would have on the complainant: in Ricky Sim's case, he was asked in cross-examination to confirm, and did confirm, that he was taking an incredible 15 to 25 pills a day. Far from being drowsy, the complainant appeared from the evidence to have been fully conscious throughout her ordeal. Neither were we able to see the relevance of anterograde amnesia in the present case, as there was no suggestion at any stage of the proceedings that the complainant should not have remembered anything after the consumption of the ten pills. In fact, the weight of evidence was so overwhelming that, even if Dr Lee had given evidence, it would not have had any influence on the result of the case. Accordingly, we dismissed the motion and also the appeals against the two charges of rape. The appeal against the

charge of robbery was not pressed by counsel, but on the evidence we can see no ground for questioning the finding of the learned judicial commissioner and the appellant's conviction on the charge.

The appellant also appealed against the sentences. He was sentenced to imprisonment for ten years and to suffer twelve strokes of the cane. Under s 376(2) of the Penal Code, the minimum sentence is eight years and twelve strokes. In our opinion, the rape was premeditated and carefully planned, and the appellant knew exactly where to bring the complainant. She was injured and the rape was repeated. The fact that the complainant on this occasion may well have exposed herself to some danger by allowing herself to be chatted up, and to go off with two comparative strangers, was not a mitigating factor in the context of today's society. In our view, the sentences were clearly not excessive.

Appeal dismissed.

Solicitors: *JB Jeyaretnam & Co.*

Reported by *Mathavan Devadas*

Syed Yassin v Euvon Industries Pte Ltd

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 735 OF 1990
THEAN J
5 DECEMBER 1990

Landlord and Tenant — Ascertainment of rent — Tenant exercised right of renewal in tenancy agreement — Premises sold to another person — Whether new owner had cause of action against tenant arising from tenancy agreement — Whether tenant's appointment of valuers to determine market rent for renewal term valid — Whether any acceptance of tenant's payments by landlord's failure to reject cheques

The defendants were the tenants of premises owned by a company ('the company'). The company granted the defendants a tenancy of the premises for two years, and cl 4(3) of the tenancy agreement ('tenancy agreement') contained a provision for a renewal of the tenancy for a further two years.

The defendants gave written notice to the company in accordance with the tenancy agreement that they wanted a renewal of the tenancy agreement. As no agreement was reached as regards a new rent, the defendants then instructed Colliers Goh & Tan ('Colliers Tan') to give them a valuation of the market rent of the premises. Colliers Tan assessed the gross rental value of the premises to be $11,000 per month. On that basis, the defendants insisted that the monthly rental of the fresh tenancy should be $11,000 per month but this was disputed by the company. The defendants paid the company by cheque $11,000 per month for the fresh tenancy.

Subsequently, the company sold and transferred the premises the plaintiff. In the course of correspondence, the plaintiff stated that the valuation of Colliers Tan was not acceptable as the latter had not been furnished the full facts. The plaintiff suggested that Colliers Tan be instructed jointly by the plaintiff and the defendants to carry out a further valuation. The defendants refused. The plaintiff then took out this originating summons seeking, inter alia, that the defendants pay to the plaintiff the fair market rent of the premises as determined by Colliers Tan.

Held, allowing the plaintiff's application:

(1) Although the tenancy agreement was made between the defendants and the company, the plaintiff had a cause of action against the defendants. The defendants had duly exercised their right of renewal and the company was bound to grant the defendants a fresh tenancy. When the premises were transferred to the plaintiff, the plaintiff took it subject to the tenancy as the defendants were tenants in possession. Such a position was provided for by ss 10 and 11 of the Conveyancing and Law of Property Act. When the premises were transferred to the plaintiff, a fresh tenancy had come into existence by reason of the right of renewal having been exercised by the defendants pursuant to cl 4(3) and the only outstanding matter was the amount rent payable.

(2) Colliers Tan had not determined the prevailing market rate of the premises as provided by cl 4(3) of the tenancy agreement. The valuation given by Colliers Tan had been made purely on the instructions of the defendants and the defendants had failed to inform Colliers Tan of the purpose for which the valuation was required. Such an appointment was not one made in compliance with the provisions of cl 4(3) as that clause contemplated an appointment to be made by the landlord and the tenant jointly. In addition, the market rate applicable was that at the date of receipt by the company of the defendants' notice of renewal, and not the market rate prevailing at the date of the report.

(3) Although the defendants' solicitors had forwarded to the company's solicitors the cheques for payments of the rent for the fresh tenancy and the company did not reject these payments, there was no evidence that the company or the plaintiff had accepted such payments as both the company and the plaintiff had disputed the rent as determined by Colliers Tan.

Legislation referred to
Conveyancing and Law of Property Act (Cap 61, 1985 Ed) ss 10, 11

G Raman for the plaintiff.
Dara Singh s/o Karam Singh for the defendants.

Cur Adv Vult

Thean J: A company called The Glamourette Shops Pte Ltd ('the company') was the owner of the premises known as No 304 Orchard Road, #02-36, #02-37 and #02-38, Lucky Plaza, Singapore ('the said premises'). By a tenancy agreement dated 31 March 1988 ('tenancy agreement'), the company granted to Euvon Industries Pte Ltd, the abovementioned defendants, a tenancy of the said premises for a term of two years commencing from 1 April 1988. The tenancy agreement by cl 4(3) thereof contained a provision for renewal of the tenancy for a further term of two years, which is as follows:

> If the tenant shall be desirous of continuing the tenancy hereby created for a fresh term of two (2) years at the expiration of the said term and shall two (2) months before